

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

99 DEC -9 PM 4:22
[Handwritten signature]

In re:) 1998 OAL Determination No. 41
Request for Regulatory)
Determination filed by JOHN) [Docket No. 96-009]
REASE BUTTS, JR. regarding)
the unwritten policy of the) December 9, 1998
BOARD OF PRISON TERMS,)
rescinding the parole dates of) Determination Pursuant to
life prisoners sentenced) Government Code Section
under the Indeterminate) 11340.5; Title 1, California
Sentence Law¹) Code of Regulations,
Chapter 1, Article 3

Determination by: EDWARD G. HEIDIG, Director

CHARLENE MATHIAS, Deputy Director
HERBERT F. BOLZ, Supervising Attorney
RAYMOND G. SAATJIAN, Staff Attorney
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether an unwritten policy of the Board of Prison Terms which: (1) applies an irrebuttable presumption that a fundamental error had occurred in the granting of all parole dates to life prisoners under the Indeterminate Sentence Law ("ISL"), then (2) schedules parole rescission hearings for *all* ISL life prisoners who had previously been granted a parole date, resulting in the rescission of those parole dates, constitutes a "regulation" which is without legal effect unless adopted pursuant to the Administrative Procedure Act ("APA").

OAL has concluded that *if* the Board of Prison Terms ("Board") has such a policy, such a policy would constitute an "underground regulation."

OAL makes no finding as to the existence or non-existence of the alleged unwritten “policy.” OAL is legally mandated to determine whether the challenged agency policy, *if it exists*, constitutes a “regulation” which is without legal effect unless adopted pursuant to the APA.

There is no question that the Board has the authority to rescind the parole date of any individual life prisoner, sentenced under ISL law, on *a case by case basis*, for good cause. If the Board wishes to exercise its discretion to adopt *general* policies governing review and rescission of parole dates, however, it must adopt regulations pursuant to the APA.

ISSUE

OAL has been requested to determine whether the alleged policy of the Board that:

- (1) applies an irrebuttable presumption that a fundamental error had occurred in the granting of the parole date of every ISL life prisoner who had been granted a parole date,
- (2) then schedules a parole rescission hearing for all ISL life prisoners to rescind those “improvidently granted” parole dates, resulting in the rescission of those parole dates,

is an “underground regulation” which is without legal effect until adopted pursuant to the APA ²

ANALYSIS

I. BACKGROUND

The Uniform Determinate Sentencing Law (“DSL”) of 1976 reflected a substantial change in the statutory scheme governing imprisonment in California, according to the court in *In Re Stanworth* (1982).³ The Legislature declared that the purpose of imprisonment was now punishment rather than social rehabilitation. Whereas the length of sentences served before parole had previously been based upon the

Adult Authority's judgment of the adjustment and social rehabilitation of the individual under the ISL, after 1976 the length of time served prior to parole would be based upon a framework of uniform terms for similar offenses. The Board of Prison Terms (as the Adult Authority's successor) was authorized to establish guidelines for the setting of parole release dates, and it now had less discretion to deviate from the guidelines than existed under the ISL. The court explained:

"We may summarize the differences between ISL and DSL rules by noting that the new regulations set a longer range of base terms for first degree murder and require the imposition of set additional terms for particular enhancements unless deviation from the norms is expressly justified. Moreover, the new rules generally reflect an attempt to achieve uniformity and stress the criminal activities of the inmate rather than any social or personal factors."⁴

In 1975, the requester was sentenced, under the predecessor statute (the ISL), to serve seven years to life in the California correctional system for kidnapping. When the DSL became effective, the requester's sentence remained indeterminate life term.

II. IS THE APA GENERALLY APPLICABLE TO THE BOARD OF PRISON TERMS' QUASI-LEGISLATIVE ENACTMENTS?

For purposes of the APA, Government Code section 11000 defines the term "state agency" as follows:

"As used in this title [Title 2. Government of the State of California (which title encompasses the APA)], 'state agency' includes every *state* office, officer, department, division, bureau, *board*, and commission."
[Emphasis added.]

The APA further clarifies or narrows the definition of "state agency" from that in Section 11000 by specifically excluding "an agency in the judicial or legislative departments of the state government."⁵ The Board is in neither the judicial nor the

legislative branch of state government. Clearly, the Department is a "state agency" within the meaning of the APA, and unless the Department is expressly exempted from the APA,⁶ the APA is generally applicable to the Board. Since no specific exemption has been enacted, the APA is generally applicable to the Board.

Penal Code section 5076.2, subdivision (a), further provides in part:

"Any rules and regulations, including any resolutions and *policy statements*, promulgated by the Board of Prison Terms, *shall be promulgated and filed pursuant to* [the APA]" (Emphasis added.)

Clearly, the APA generally applies to the Board's quasi-legislative enactments.⁷

III. DOES THE CHALLENGED "POLICY" CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,⁹ the California Court of Appeal upheld OAL's two-part test⁹ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule satisfies both parts of the two part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, OAL is mindful of the admonition of the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*" (Emphasis added.)¹⁰

This Request for Determination

John Rease Butts, Jr. ("requester"), in 1993, requested a determination regarding the policy of the Board of:

*"Reviewing all grants of parole, and rescinding those paroles without any rescission issues, or good cause appearing in the prisoner's record, or new information that wasn't available at the time parole was granted."*¹¹
(Emphasis added.)

The Board provided the following historical information regarding the parole “Procedural History”¹² of the requester, which includes, in part:

- (1). October 9, 1985--- requester was granted a “release date” of December 1996;
- (2). January 6, 1986--- the initial release date of December 1996 set for the requester was modified by the Board to advance the “release date” to February 1994;
- (3). August 24, 1993--- the Board rescinded the parole date of the requester;
- (4). September 24, 1998--- the Board granted the requester a “release date” of December 2003.

In his appeal of the rescission of his parole, a copy of which was attached to the request for determination, the requester alleged that the Board had no authority to rescind his parole date:

“... This *new policy* of the BPT’s [Board] scheduling and *convening rescission hearings in the absence of ‘rescission issues’ or ‘good cause’* is a discretion not conferred upon the BPT by any Legislature, or enabling statute, or promulgated by any approved administrative procedures practice (APA). It is only in the last *one-to-two years* that the BPT has begun discriminately *rescinding all parole release dates* of life prisoners who had been found suitable and granted parole. . . . Absent any serious rule violation or disciplinary hearing in which I was found guilty after a full and fair hearing, the BPT had no discretion to deny me my good time credits. *Absent any ‘good cause’* appearing based upon a reasonable conclusion, *the BPT had no discretion to rescind my parole release date.*”¹³ (Emphasis added.)

In the Board’s response, it stated:

“The Board’s authority to hold a [parole rescission] hearing for an ISL prisoner under present, not ISL, law was decided in *In re Stanworth* (1982) 33 Cal.3d 176, in which the *Stanworth* court held that the Board’s application of present day rules to an ISL prisoner was not a violation of ex-post facto law. . . . the Board of Prison Terms is the administrative agency authorized to grant parole and fix parole dates pursuant to Penal Code section 5075 et seq., and is empowered to rescind a parole date for good

cause. *Cause for rescission may exist if the Board reasonably determines in its discretion that parole was improvidently granted under the circumstances that appeared at the time of the grant, or that may have appeared since.*"¹⁴ (Emphasis added.)

In its response of October 9, 1998, the Board acknowledged the receipt of a supplemental declaration "Comment on OAL Docket No. 96-009"¹⁵ filed by inmate Carl McQuillion on behalf of requester, essentially raising issues and arguments in support of requester's contention. OAL has also received the supplemental declaration of Mr. McQuillion and has considered its contents in evaluating the claims of the requester.¹⁶

A. IS THE CHALLENGED POLICY A "STANDARD OF GENERAL APPLICATION?"

OAL next considers whether the challenged policy is one of general application. For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.¹⁷

It is clear that the alleged policy constitutes a standard of general application because it applies to all California life prisoners whose parole dates, which were previously granted under the ISL, have been rescinded. Therefore, OAL concludes that the challenged policy, if it exists, is a standard of general application.

B. DOES THE CHALLENGED POLICY INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

Penal Code section 3040 provides in part:

“The Board of Prison Terms shall have the power to allow prisoners imprisoned in the state prisons pursuant to subdivision (b) of Section 1168 to go upon parole outside the prison walls and enclosures.”¹⁸

Penal Code section 3060 provides:

“The parole authority shall have full power to suspend or revoke any parole, and to order returned to prison any prisoner upon parole. The written order of the parole authority shall be a sufficient warrant for any peace or prison officer to return to actual custody any conditionally released or paroled prisoner.”¹⁹

The Board also notes in its response to OAL that its authority to rescind previous grants of parole to any prisoner has been clarified in case law:

“... the court case of *In re Fain*, (1976) 65 C.3d 470, held that the Adult Authority, now the Board of Prison Terms, has the authority to rescind a decision granting parole as an adjunct to the plenary power given to the Adult Authority (Board) in Penal Code Section 3060.”²⁰

In implementing its statutory authority to rescind parole dates for ISL prisoners, the Board has adopted regulations. Section 2450 of Title 15 of the California Code of Regulations states:

“The ISL parole date of an ISL prisoner or the parole date of a life or nonlife [Penal Code] 1168 prisoner *may be* postponed or *rescinded for good cause* at a rescission hearing. Rescission proceedings refer to any proceedings which may result in the postponement or rescission of a release date.”²¹ (Emphasis added.)

Section 2450 gives the Board the discretion to determine whether good cause exists to rescind the parole date of an ISL life prisoner. Good cause is not defined.

Section 2451 (“Reportable Information”) provides that the Board shall determine whether to initiate rescission proceedings and requires that the staff of the Department of Corrections report to the Board certain types of prisoner conduct

listed in that section (for instance, assault with a weapon or attempt to escape) which may result in rescission proceedings and also to report:

“(c) Other. Any *new* information which indicates that parole should not occur. Examples include: an inability to meet a special condition of parole, such as failure of another state to approve an interstate parole; information significant to the original grant of parole was fraudulently withheld from the board; or fundamental errors occurred resulting in the improvident granting of a parole date.” (Emphasis added.)²²

The Board contends that “Cause for rescission [under section 2450] may exist if the Board reasonably determines in its discretion that parole was improvidently granted under the circumstances that appeared at the time of the grant, or that may have appeared since.”²³

The Board is contending that the final phrase of section 2451, subsection (c) of Title 15 means that it can decide, without any new evidence, to rescind a parole date, if it decides that “fundamental errors occurred resulting in the improvident granting of a parole date.” The context of this language is instructive. Section 2451 defines the type of information which Department of Corrections staff must report to the Board which *may* result in a parole rescission hearing. In addition to specifying the type of conduct occurring after a parole date has been granted which must be reported, that section specifies in part that reporting is also required for:

“ . . . [a]ny new information which indicates that parole should not occur.”²⁴

The language “fundamental errors occurred resulting in the improvident granting of a parole date” is given in subsection (c) of section 2451 as an example of *new information which must be reported to the Board*.²⁵ Section 2451 does not give the Board the authority to rescind an ISL parole date in the absence of “new information.” According to subsection (c), “new information” includes significant “information” that was fraudulently withheld from the Board at the time parole was originally granted.

The alleged policy is not that the Board decides to rescind ISL parole dates based upon subsequent conduct or other new information *in each case*, but that the Board presumes *generally* that parole has been improvidently granted to all ISL

life prisoners and schedules rescission hearings for all of those life prisoners, resulting in the rescission of the ISL parole dates of those prisoners.

Sections 2450 and 2451 state that the Board shall determine whether to initiate rescission proceedings, and that the parole date of an ISL life prisoner may be rescinded for good cause. This gives the Board the discretion to decide whether to initiate rescission proceedings and the discretion to determine whether good cause exists to rescind a parole date. There is no presumption expressed in either section 3060 of the Penal Code or sections 2450 and 2451 of the duly adopted regulations that a fundamental error occurred in the granting of all parole dates to ISL life prisoners. Nor do those sections contain a mandate that parole rescission hearings be scheduled for those prisoners, resulting in rescission of all parole dates established under the ISL.

Therefore, both portions of the alleged policy interpret not only Penal Code section 3060, but also section 2450 and subsection (c) of section 2451, of Title 15 of the California Code of Regulations. Since the alleged policy, if it exists, meets both parts of the statutory two-part test, OAL concludes that it is a "regulation" and is without legal effect until it is adopted pursuant to the APA.

IV. DOES THE CHALLENGED POLICY FALL WITHIN ANY *SPECIAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

In its response, the Board does not contend that any special exemption applies. OAL concurs. No special express exemption applies.

V. DOES THE CHALLENGED RULE, WHICH HAS BEEN FOUND TO BE A "REGULATION," FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.²⁶ Rules concerning

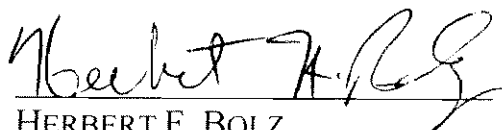
certain specified activities of state agencies are not subject to the procedural requirements of the APA.²⁷

The issue of the applicability of exceptions to APA requirements was not raised by either the requester or the Board. OAL's independent review discloses no applicable exceptions. No express statutory exemption applies.

CONCLUSION

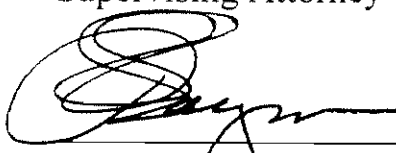
For the reasons set forth above, OAL has concluded that, if the Board has an unwritten policy of scheduling parole rescission hearings for all ISL life prisoners who had previously been granted parole dates, resulting in the rescission of those parole dates, then that policy constitutes a "regulation" as defined in the key provision of Government Code section, subdivision (g), and is without legal effect until adopted pursuant to the APA.

DATE: December 9, 1998



HERBERT F. BOLZ

Supervising Attorney



RAYMOND G. SAATJIAN

Staff Attorney

Regulatory Determinations Program

Office of Administrative Law

555 Capitol Mall, Suite 1290

Sacramento, California 95814

(916) 323-6225, CALNET 8-473-6225

Telecopier No. (916) 323-6826

Electronic mail: staff@oal.ca.gov

i:\98.41

ENDNOTES

1. This Request for Determination was dated September 10, 1993 and was filed by John Rease Butts, Jr., B-69675, P.O. Box 608, 1-22L, Tehachapi, Ca. 93581 (Current address P.O. Box 600, C-307, Tracy, CA. 95378-0600). The agency's response was dated October 9, 1998 (as corrected by letter, dated October 26, 1998), and was submitted by James W. Nielsen, Chairman, 428 J. Street, 6th Floor, Sacramento, California 95814, (916) 445-4072.
2. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.
3. 33 Cal.3d 186, 187 Cal.Rptr. 783.
4. *In Re Stanworth* (1982) 33 Cal.3d 176, 186, 187 Cal.Rptr. 783, 789.
5. Government Code section 11342.
6. *See Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746-747 (Unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App. 3d 932, 942, 107 Cal.Rptr. 596, 603).
7. The APA would apply to the Board's rulemaking even if Penal Code section 5076.2, subdivision (a), did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of Government, as prescribed in Government Code section 11342, subdivision (a).
8. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. A 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978)

22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

The Tidewater court itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

9. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)"

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in *California Regulatory Notice Register* 96, No. 8-Z, February 23, 1996, p. 292. 1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

10. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
11. Request for Determination, p.1.
12. "Procedural History," John Butts, B-69675, Docket 96-009.
13. "Appeal" of Recision of Parole, by John Rease Butts, Jr., B-696675, dated September 2, 1993, p. 2.
14. Board of Prison Terms response, by James W. Nielsen, Chairman, dated October 9, 1998 (as corrected by letter, dated October 26, 1998), 428 J. Street, 6th Floor, Sacramento, California 95814, (916) 445-4072. p. 1.
15. "Comment on OAL Docket No. 96-009," by Carl D. McQuillion, B-54054, California Men's Colony-East, P.O. Box 8101-4222, San Luis, Ca. 93409-8101, September 22, 1998.
16. On October 8, 1998, Carl McQuillion, while an inmate at the California Men's Colony-East, submitted a request for determination regarding the Board of Prison Terms unwritten policy of rescinding the parole dates of life prisoners granted those parole dates under ISL, and other issues, including the failure to set a new parole date

within 12 months of the old date, etc. Initially, OAL thought Mr. McQuillion's request was substantially the same as Mr. Butts'. After further review, OAL has determined that part of Mr. McQuillion's request challenges the same unwritten policy regarding the rescission of paroles as is challenged by Mr. Butts: thus, this part of the McQuillion letter will be considered in this determination. However, the balance of Mr. McQuillion's request raises new issues, which will not be included in this determination.

17. *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App. 3d 622, 167 Cal.Rptr. 552.
18. Penal Code section 3040.
19. Penal Code section 3060.
20. Agency response, p. 2.
21. Section 2450, Title 15, CCR.
22. Section 2451, Title 15, CCR.
23. Agency response, p.2.
24. Section 2451, subsection (c), Title 15, CCR.
25. According to subsection (a) of section 2451, reportable information includes but is not limited to specified types of conduct (such as assault with a weapon) occurring after the grant of the parole date.
26. Government Code section 11346.
27. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec.11342, subd. (g).)
 - c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

- e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342. subd. (g).)
- f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found In 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.